

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JOSE LOPEZ-PINONES,

Petitioner, CR. No. S-04-0239 DFL KJM P
CIV. No. S-05-1219 DFL KJM P

vs.

UNITED STATES OF AMERICA,

Respondent. ORDER

Petitioner moves to vacate his sentence under 28 U.S.C. § 2255. The motion is DENIED.

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20 On August 19, 2004, the court sentenced Pinones to forty-six
21 months in prison after Pinones pled guilty to one count of
22 violating 8 U.S.C. § 1326. Rather than stand trial, Pinones
23 entered into a plea agreement with the government. In that
24 agreement, Pinones and the government agreed to a forty-six month
25 sentence. In addition, Pinones "specifically agree[d] not to
26 file a motion under 28 U.S.C. § 2255 or § 2241 attacking any

1 aspect of his conviction or sentence." (Plea Agreement at 3.)
2 On June 20, 2005, Pinones filed this § 2255 motion attacking the
3 following aspects of his conviction and sentence: (1) the
4 effectiveness of his counsel; (2) the legality of his sentence;
5 and (3) the government's failure to comply with the plea
6 agreement provisions. Because Pinones asserts that he did not
7 knowingly sign the plea agreement, and because the government has
8 not submitted a transcript of the plea colloquy, the court will
9 bypass this factual determination and address the merits of the
10 petition.

II.

12 Pinones argues that he received ineffective assistance of
13 counsel in violation of the Sixth Amendment because counsel
14 informed him of the wrong maximum sentence. Pinones asserts that
15 his counsel advised him that the maximum sentence he faced was
16 twenty years when the statutory maximum for a sentence under §
17 1326(a) is two years. Pinones is wrong.

18 Although § 1326(a) provides for a two year maximum sentence,
19 § 1326(b) states that, notwithstanding the sentence limitation in
20 § 1326(a), the statutory maximum sentence for an individual who
21 is found guilty of violating § 1326 depends on several factors.
22 In particular, § 1326(b) (2) provides a maximum sentence of twenty
23 years for a prior felon who violates § 1326. There is no dispute
24 that Pinones is a prior felon. Therefore, Pinones's counsel was
25 correct to inform him that he could be sentenced to a maximum of
26 twenty years in prison for violating § 1326. Pinones' general

1 assertion that counsel did not spend enough time with him, does
2 not show ineffective assistance. For these reasons, the court
3 finds that Pinones has failed to show a violation of his Sixth
4 Amendment rights.

5 Similarly, Pinones's arguments that the forty-six month
6 sentence violates the statutory maximum and federal sentencing
7 guidelines also fail. As discussed above, because Pinones was a
8 convicted felon when he violated § 1326, the maximum sentence he
9 could have received under the statute was twenty years.
10 Pinones's forty-six month sentence is well below the statutory
11 maximum and within the federal guideline range.

12 Finally, Pinones's assertion that the government failed to
13 reduce his offense level by four points for participating in an
14 early disposition program is patently false. Pinones's Base
15 Offense Level was eight. This was increased by sixteen points
16 for his felony conviction. From this total of twenty-four
17 points, the government subtracted three points because Pinones
18 accepted responsibility and four points because the plea offer
19 was part of an authorized early disposition program. This left
20 Pinones with a offense level of seventeen. Because Pinones's
21 Criminal History Category was five, the sentencing range was
22 forty-six to fifty-seven months. Thus, Pinones's sentence was at
23 the very bottom of the range that was based in part on a four
24 point reduction which resulted from the plea agreement. There is
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1 no violation of the plea agreement here.¹

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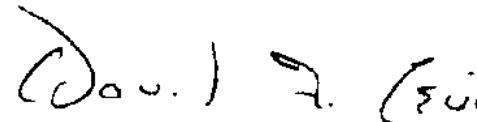
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4 III.

5 For the reasons stated above, the court finds that Pinones
6 has failed to demonstrate that his sentence violated the
7 Constitution or a federal statute. The petition is DENIED.

8 IT IS SO ORDERED.

9 DATED: 3/7/2006



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11 DAVID F. LEVI
12 United States District Judge
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25 ¹ Defendant attempts to raise an issue concerning the
26 calculation of his criminal history. He does not show that he
raised this issue during sentencing. Nor is the claim included
in the motion. Accordingly, the court declines to address the
argument.